IN ARBITRATION PROCEEDINGS
PURSUANT TO THE AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy **between** **PILKINGTON NORTH AMERICA** **and** **UNITED STEELWORKERS OF AMERICA, AGB DIVISION, AFL-CIO, CLC On Behalf of its Lathrop, Local 418G And Ottawa, Local 19G** **Re: S____ M_____ Discharge Grievance FMCS No. 01-154-80**	**OPINION AND AWARD** **of** **Charles H. Pernal, Jr. Arbitrator** **January 31, 2003 Eugene, Oregon**

This Arbitration arises pursuant to the Labor Agreement (Agreement) between United Steelworkers Of America, ABG Division, AFL-CIO, CLC On Behalf of its Lathrop, Local 418G and Ottawa, Local 19G (Union), and Pilkington North America (Employer), under which Charles H. Pernal, Jr. was selected to serve as Arbitrator and under which his Award shall be final and binding upon the parties.

Hearing was conducted on August 21, 2002 at Stockton, California. The parties had the opportunity to examine and cross-examine witnesses, introduce relevant exhibits, and argue the issues in dispute. The Union and Employer each filed post-hearing briefs dated December 13, 2002.

APPEARANCES:

On behalf of the Union:

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Staff Representative
United Steelworkers of America
District 12, Sub-District 1
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Concord, California 94520

On behalf of the Employer:

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ISSUES

At hearing, the parties agreed to the submission of the following issues:

1. Did the Employer have just cause to discharge Grievant?
2. If not, what should be the remedy?

RELEVANT SECTIONS OF THE AGREEMENT

ARTICLE II RECOGNITION

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2.02 The Company recognizes and will not interfere with the right of its employees to be members of the Union. There shall be no discrimination, interference, restraint, or coercion by the Company or any of its agents against any employee because of membership in the Union. The Company will not reclassify employees or duties or occupations, or engage in any subterfuge for the purpose of defeating or evading the provisions of this Agreement

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ARTICLE XI COMPLAINTS AGAINST DISCHARGE OR SUSPENSION

11.01 The Company retains the right to discharge, suspend, or otherwise discipline all employees; but no employee will be discharged, suspended, or otherwise discipline without just cause, and any such employee shall, at the time of his discharge, suspension, or other discipline, be given the reason, therefore, in writing. If investigation proves any injustice has been done, the Management will revoke said discharge, suspension, or other discipline and will reinstate said employee and compensate him at his regular rate for any earnings lost. Any complaint under this Section must be filed with the Management in writing within ninety-six (96) hours, excluding Saturday, Sunday, and holidays, after such discharge, suspension, or other discipline, or the particular case will be considered as closed. Any notice of discharge, suspension, or other discipline shall advise the employee of this fact. The department representative will be furnished with a copy of the written notice of discharge, suspension, or other discipline, at the same time it is given to the employee. The Local President shall be furnished with a monthly list of such discharges, suspensions, or other discipline. As used in this Section, the terms "other discipline' or "otherwise discipline" shall mean a disciplinary demotion or a warning slip.

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LATHROP PLANT LOCAL AGREEMENT
ATTENDANCE POLICY

INTENT:

To establish a standard, clear policy that is applied consistently to track and address absenteeism and tardies.

BACKGROUND:

The success of our Company is dependent on each employee's job performance. Regular and punctual attendance is, of course, an essential part of job performance and a responsibility of employment. When employees arrive at work late, leave early, or miss a shift altogether, their absence places an added burden on their co-workers and our ability to meet the requirements of our customers. For these reasons, employees are expected to be at work everyday that they are scheduled.

PURPOSE:

The objective of PLOF Lathrop's attendance program is to review employee's attendance on a uniform and consistent basis for purposes of recognizing employees with superior attendance and counseling with those who need to make improvements.

The Company appreciates the efforts of those employees who are able to achieve a record of attendance excellence. Accordingly, we have established programs to recognize the achievements of those employees.

In working with employees with substandard attendance, our objective is to encourage improvement through counseling and assistance. It is only when such problem solving efforts fail that additional measures are taken.

DEFINITIONS:

Violation--For the purpose of tracking attendance, any time an employee misses more than four hours of their shift.

For the purpose of tracking tardies, a violation will result each time an employee is late. Late is defined as not being at the work station at the designated starting time with all required tools and safety equipment. Additionally, an employee requested leave early will be considered a tardy.

(a) During the rolling twelve month period, the following progressive disciplinary system will be used when an individual is absent as indicated. Warnings must be issued within 30 days, otherwise, absences will not be used in future discipline.

STEP	**NUMBER OF UNEXCUSED ABSENCES**	**DISCIPLINARY ACTION**
1	7 Days	Written verbal warning given by the Supervisor along with shift grievance person.
2	8 Days	First Written Warning. Formal meeting with Supervisor and shift grievance person. Meeting would discuss the nature of previous absences and ways of avoiding further absences.
3	9 Days	Second Written Warning. Meet with Human

		Resources, Department Manager, IRC and Union President. Suspension with time off. Maximum 7 calendar days.
4	10 Days	Final Written Warning. Meet with Human Resources, Department Manager, IRC and Union President. Suspension with time off. Maximum 14 calendar days. Twelve month period is frozen until employee returns from suspension.
5	11 Days	Discharge.

Successive or frequent repeat unexcused absences between steps could result in an employee going to subsequent steps up to and including Step 5. These situations will be discussed with the Plant Manager and Union President.[1]

2. Employees are considered "absent" if:

(a) They do not report to work for their regularly scheduled shift. Voluntary and Forced overtime is considered scheduled work.
(b) "No call"--An employee who fails to call off prior to the shift will receive the following:
1. Employee must call off prior to the start of the shift or be considered an unexcused absence.
2. Three no call-offs in three successive days will result in automatic discharge.

3. Employees are charged with unexcused absences unless the absence was due to any of the following:

(a) Hospitalization (their own)
(b) Out-patient surgery
(c) Family/Medical Leave (granted in Accordance with Federal/State Laws)
(d) Funeral Leave
(e) Jury Duty
(f) Military Leave
(g) Vacation
(h) Union Business

For medical emergency situations, medical certification must be provided for items 3(a), 3(b), and 3(c) within five business days from first day of absence and non-emergency medical situations, within three business days from first day of absence.

4. The plant will maintain absentee records and apply the discipline procedure as indicated using rolling twelve (12) month periods.

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CALL-OFF PROCEDURE (NOTIFICATION OF ABSENCE)

An employee must call off prior to the start of the employee's scheduled shift. Call-off number is 858-6395.

[1] I will refer to these two sentences hereafter as the "Acceleration Clause."

The following constitutes a call off:

1. Call off to the call off number (858-6395) prior to the start of the shift.
2. If an employee notifies the Company he or she will be off work more than one day, that employee will be allowed to return to work prior to the return to work date only with the approval of the department Supervisor.

THE EFFECTIVE DATE OF THIS AGREEMENT WILL BE JANUARY 1, 2000.

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LATHROP AND OTTAWA PLANTS
SUPPLEMENTAL AGREEMENT
RULES OF ARBITRATION

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11. In cases involving matters of discharge or discipline, the Company shall bear the burden of proof and go first.

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FACTS

Preliminary Statement

This matter centers on the discharge of bargaining unit employee S___ M___, Grievant, due to absenteeism. The Employer, which bears the burden of proof in this type of matter, contends that it had just cause to discharge Grievant as provided by the Agreement because she failed to appear for work on two successive work days, June 22-23. The Employer, given Grievant's record of absenteeism, asserts that these two days of absenteeism placed her at Step 5 of the Agreement's Attendance Policy. According to the Employer, the decision to discharge Grievant was reached on June 23, 2000.[2]

The Union contends that the Employer, for its part, failed to meet the progressive discipline requirements of the Attendance Policy. In this regard, the Union asserts that the Employer's decision to discharge Grievant was made on June 22, the date on which, if anything, Grievant should have been subject to the Final Warning level of Step 4 of the Attendance Policy. Instead, the Employer, in essence, omitted Step 4, proceeded directly to Step 5 on June 22, and, by virtue of the Employer's asserted failure to comply with the progressive disciplinary steps of the Policy, did not discharge Grievant for just cause. While the Grievant's discharge-related documents show that she was discharged on June 23, the Union argues that Grievant's absence on June 23 was directly occasioned by the Employer's notification to Grievant and the Union on June 23 that Grievant's discharge had been effectuated on June 22, and, therefore, Grievant's absence on June 23 cannot be relied on by the Employer to justify its discharge decision under the provisions of the Attendance Policy

In view of the foregoing, it will be necessary to provide some analysis as to the sequence of events leading to June 23.

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[2] All dates hereafter are calendar year 2000 unless otherwise noted. References to page numbers in the official transcript are identified as "(Tr.__);" references to Union, Employer, and Joint Exhibits shall be, respectively, "(U-)," "(E-)," and (JT-)."

Background

The Employer, a successor to Libby-Owens-Ford, is engaged in the manufacture of glass at its Lathrop, California facility. The Employer acquired Libby-Owens-Ford in 1998. (Tr. 59) The Agreement covers two facilities of the Employer, Lathrop and Ottawa, Illinois. The Agreement is organized into commonly applied parts called "Labor Agreement" and "Supplements" consisting of signed "supplemental agreements," "letters," and "memoranda of agreement." Also appended to the Agreement are various "Lathrop Local Agreements" and Ottawa Local Agreements" which separately apply to the two respective facilities.

The Attendance Policy [the Policy also includes a tardiness component, which is not material for purposes here], appears to have been the subject of particularized collective bargaining between the parties. For instance, while containing common elements, the Attendance Policy for Lathrop is far more detailed than that of Ottawa. I would infer from this and the extensive Preamble to the Attendance Policy that the Lathrop Attendance Policy was the subject of rather specific collective bargaining negotiations to reflect uniquely local concerns. Lathrop Human Resource Manager L____'s name appears as one of three representatives of the Employer on the signature page to the Policy. None of the names of the witnesses who testified on behalf of the Union appears on the signature page as one of the Union negotiators.

The Attendance Policy has an effective start date of January 1. HR Mgr. L_____ testified that the Acceleration Clause in the Policy vests the Employer with the option to accelerate the disciplinary steps under certain circumstances. (Tr. 50-51) The Union contends that this proposition acknowledges the existence of but one sentence in the Acceleration Clause; in the absence of the Employer meeting its obligations under the second sentence, the Union contests that there was just cause to accelerate the steps for Grievant's circumstances.

The Employer did not contest the Union's position that the parties negotiations for the Attendance Policy included the agreement that any records of absenteeism which predated January 1, could not be considered by the Employer ["clean slate"] with the advent of the Attendance Policy and its January 1 effective date. Another aspect of the Policy is that it is "rolling." By this the parties intended that an employee's record of absenteeism would be ordinarily assessed for the most current 12-month period; days of absence going back beyond a current 12-month period in essence fall out of the employee's record. This "rolling" aspect is not material here, given that Grievant's discharge was within six months of the commencement of the Attendance Policy.

All employee absences are "unexcused" unless they meet certain exceptions specifically described in the Policy. While the Ottawa Attendance Policy, unlike Lathrop, specifically utilizes the term "no fault" in describing its operation, the Lathrop Policy can be fairly described as "no fault," as well.

Grievant's Attendance Record

Although unclear whether Grievant's service with Libby-Owens-Ford was uninterrupted, Grievant's seniority with this Employer dates back to June, 1979. (Tr. 115). Grievant was employed in the Employer's automotive glass operation that comprises about 140 of the 400 employees at its facility. (Tr. 57-58). Her job assignments included press operator and furnace take off.

The Employer introduced an Employee Attendance Calendar [E-2] summarizing the dates Grievant was absent from work for reasons both unexcused as well as excused. With respect to unexcused

absences after January 1, Grievant took unexcused absences on January 3-5, 21, 28, and February 1-2. The record shows she took an extended period of physician-certified FMLA leave starting February 3 and reported back to work on April 3.

During the above period of leave, she received a Verbal Written warning dated February 10, given that, before the start of FMLA leave, she had amassed 7 unexcused days up to and including February 2.

Grievant's Attendance Calendar shows that additional FMLA days were taken. Of relevance, however, is that on April 13 a "sick" (not FMLA) day was recorded which resulted in a First Written Warning dated April 19 [By now, 8 unexcused days had been amassed]. Grievant's record then shows an April 26 "no call" unexcused absence[by now the 9th unexcused absence], the taking of some FMLA days and a seven "calendar" day suspension from May 3-8. The Second Written Warning for the 9th unexcused day is dated May 3, the same date on which the suspension is begins.

As provided by the Attendance Policy, when progressive discipline is imposed, the Employer conducts a counseling meeting with an employee at which Union representatives are present. In the case of Grievant's prior Warnings, Grievant was asked by Employer representatives whether there was anything Grievant had to say before receiving the formal warning. (Tr. 24-27)

At this juncture, Grievant would ordinarily fall just short of the Final Written Warning level under the Attendance Policy, and subject to a 14 calendar day suspension, if another [or 10th] unexcused day were to be taken by her.

After her return from 7-day suspension, Grievant took some additional physician-certified FMLA days, up to, and including, June 21.

HR Mgr. L____, whose job duties include, of materiality herein, responsibility for the administration of the Agreement, disciplinary procedures including maintenance of attendance records, and employee performance matters, testified that, after June 21, Grievant was recorded as having 2 more "no call offs," meaning the failure to call in that she would be absent as well as the absence itself. HR Mgr. L____ testified that Grievant did not receive a Final Warning because she had two consecutive no call days, so that there was no an "opportunity to change behavior, have a counseling session." (Tr. 30)

The June 21 Discussion Between Grievant and Human Resources Manager L_____

HR Mgr. L____ testified that Grievant phoned her on this date and "indicated that she needed some more time off from work and was inquiring what she could do. She asked me a variety of question.. She indicated she knew she needed more time off and without having anything available and needing to be absent at least the next day, she did request if the company would give her next discipline level, which would have been a 14 day suspension for ten unexcused absences." (Tr. 32) She "indicated to her[Grievant] when Grievant asked the question about the 14 day suspension that she was not at that point in the discipline and I could not administer that and wasn't willing to discuss it. However there were other means that she could use to avoid risking termination and she had available vacation time, and I suggested she consider requesting some vacation time to cover those absences." (Tr. 32-33) HR Mgr. L____ testified, "I don't recall her responding what she was going to do. I explained the procedure and that she needed to talk to J__ M____ or myself if she did want to exercise any those[sic] vacation days." She also testified that she did not recall Grievant "responding what she was going to do." (Tr. 33)

The conversations at issue in this proceeding occurred more than 2 years before the hearing in the matter. I have relied on contemporaneous memoranda prepared by the Union and Employer a more accurate recounting of conversations at or close to the time they occurred.

In a file memo of this conversation prepared by HR Mgr. L____ and introduced by the Union [U-8], she states:

> S____ called me this morning indicating she needed more time off to be with her son due to his illness. I explained where she was with her FMLA and today being her 90th day.[3] S____ asked if she would be considered for a leave of absence and I explained the process. I told S____ the request would be made to the Department Manager, in her case, J__ M____. J__ would discuss the request with me and an evaluation of the attendance record would be reviewed for consideration. S____ immediately said with her attendance record, she probably wouldn't be given a leave. I said, since we do consider the attendance record, it wouldn't look promising for granting the leave, however she could go through the process if she felt it was necessary. We discussed her attendance and days she had against her and as of this conversation, S____ had nine unexcused absences. I mentioned to S____ that she still had a significant amount of vacation time available and suggested she request vacation to avoid getting into further attendance issues and risk suspension and/or termination. S____ asked if the Company would give her a 14 day penalty suspension that she would have coming to her since she knew she would be missing tomorrow, which would put her at penalty stage for ten unexcused absences. I told S____, I couldn't administer the discipline until she actually incurred the absence for that level and again suggested she consider taking vacation versus facing penalty. S____ thanked me for my time and the call was ended.

As will be more fully discussed below, Grievant testified that she did not recall any conversation with HR Mgr. L____ on June 21; rather, Grievant testified that much of the subject matter of the conversation, which Ms. L____ ascribes to June 21, occurred on June 22, the date of Grievant's unexcused absence.

The Events of June 22

Employer Position. Ms. L____ testified that Grievant was a "no call, no show" on this date.

Ms. L____ testified that she contacted Union President E__ S____ and indicated that she and [then] Automotive Operations Mgr. J__ M____ would like to discuss with him Grievant's "attendance record and the contractual language that talks about successive, frequent repeat unexcused absences and wanted to schedule a meeting to discuss that." (Tr. 33-34. 36)

In this regard, she testified that the Employer's policy was that "employees who are at the various levels of warning and they incur further warnings and don't seem to change their behavior and understand that they need to be dependable, loyal employees to continue working. (sic) In this particular case, at the time, our concern was S____ had had the seven calendar day suspension. She incurred another unexcused

[3] The Employer was counting FMLA days under its own administrative system which accounts for 90 days taken in a rolling 12-month period, a period not at all synchronous, at least in the circumstances of this case, with January 1, 2000, the starting date for the Attendance Policy.

absence, which would have given her a 14-day calendar suspension. When employees have that kind of pattern and there's no sign of improvement, we need to have a discussion if this employees is someone that should really be working at Pilkington." (Tr. 34)

Along the lines of testimony, a document prepared by Ms. L____ titled "General Comments/Discussions" (JT-4), reveals:

> 6/22/00--S___ was a no call, no show bringing her to 10 days unexcused absences. J__ M____ and S__ L____ discussed talking to E__ about S____'s excessive absenteeism. The decision was made to discuss with E__ exercising contractual language in the Attendance Policy relative to successive or frequent repeat unexcused absences and the elevation in steps up to and including termination.
>
> Scheduled a meeting with E__ to discuss on Friday, June 23, 2000 at 7:30 am.

Union Position. The Union adduced the testimony of R__ J____ who, on June 22, was the IRC[steward] of the automotive department. He testified that at about 7:30 - 8:30 a.m. Ms. L____ called him into her office. She stated that Grievant had not shown up and that she was going to discharge Grievant for excessive absenteeism. J____ testified he told Ms. L____ that she could not do this, that this was Grievant's 10th day, and Grievant was due to receive 14 days off.

At some point in this conversation, he testified that Grievant phoned Ms. L____, and that he heard Ms. L____ state there was no use calling in, she was already too late. He testified he did not know all of what was stated between them because he was himself talking on the phone. (Tr. 70)

IRC J____ testified Ms. L____ told him during their meeting that she was going to discharge Grievant. Mr. J____ told her that she would have to contact Mr. S____ because he was President and he took care of all discharges. He listened when Ms. L____ then phoned Mr. S____ who told her, while on the speakerphone, that he, S____, would not be able to be there until the following day, that he had something else to do. Mr. J____ testified that President S____ stated he would call Grievant into the Union office and meet with Ms. L____ on the 23rd at 1:00 p.m.
(Tr. 70-72)

IRC J____ testified, concerning his understanding of Ms. L____'s action, "You're discharging her on the 10th day." And she said she was doing it for excessiveness and she was going to do it." (Tr. 75)

Mr. J____ further testified that had this been a 14-day suspension, he would not have called Mr. S____. (Tr. 72)

Un President E__ S____ also testified concerning the above conversation with Ms. L____. His contemporaneous memorandum (U-1) recounts the dialogue of this conversation:

> About 4:30 pm[4] I received a call from S__L_____

[4] Although the Employer attempted to inquire concerning the time of day Mr. S____ attributed to this conversation, the ensuing responses and follow-up questioning moved back and forth between June 22 and June 23. The witness explained the sequence of events, but never understood that the 4:30 p.m. time made no sense in relation to Mr. Jenkins testimony and the very text of the

S__--E__ are you coming back to the plant today?
E__--Why?
S__--We are going to terminate S__ M____ for successive or frequent repeat unexcused absences.
E___--No I am not coming back to the plant, we can handle it June 23/00 I want to meet with R__ and S___ first! I will set up a meeting with them first.
S__--E__ we want to bring her in for termination on 6/23/00
E__--S__ I would like to talk to M____ first.
S__--OK

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In his testimony, Mr. S____ also stated that he was informed that Grievant was being brought in on the 23rd for termination. (Tr. 89)

The Events of June 23

Employer Position. HR Mgr. L____ testified that she and Mgr. M____ met with Mr. Somera on this date. She testified M____ and she jointly discussed their concerns with Grievant's absentee record, specifically the two back to back no call, no shows. She and Mgr. M____ and she indicated it was appropriate to exercise the Employer's rights to bypass the final warning under the Attendance Policy. (Tr. 36-37, 43)

Ms. L____'s General Comments/Discussions (JT-4) states:

> Met with E__ to discuss S____'s excessive attendance. E__ informed J__ and S__ that he had asked the Company to deal with it for many years and they haven't. E__ was informed that S____ was a no call, no show for the second day which puts her at discharge stage. E__ informed J__ M____ and S__ L____ that he told S____ to no report to work. J__ informed E____ that he did not have that right and the absences would be recorded as a no call, no show. E__ said he planned to meet with S____ at 7:00 am on this day to get her story before meeting with J__ and S__. S__ asked E__ if he met with S___ and he said no. J__ informed E__ the absence S___ incurred on this day was the eleventh and we needed to schedule a meeting with her at 1:00 pm.

The meeting with Grievant took place at 1:00 p.m. Mr. J__ M___, Manager of Automotive Operations, was acting plant manager on this date. According to Ms. L____'s testimony, Mgr. M____ asked Grievant why she was a no call/no show for the past two days. Grievant indicated that she didn't think that she needed to call off for the 22nd of June of 2000 because it was a no fault policy and she also indicated that E__ S____ said she did not need to report to work on June 23 of 2000. Mr. M____ indicated to Grievant that Mr. S____ did not have the right to tell her not to report to work and that that absence on the 23rd of June put her at termination stage. (Tr. 44-45)

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dialogue recounted. The time is wrong; but this is a collateral matter. In light of Mr. Jenkins' corroborating testimony, I cannot conclude that this dialogue and Mr. S____'s testimony, unrebutted by the Employer, was a fabrication.

Ms. L____ testified that Mr. S____ indicated that he had always been given the opportunity to meet with employees who were at critical stages in performance or discipline and felt that he had the right to schedule a time to meet with Grievant. Mr. M____ responded that Mr. S____ knew that if he needed to request to meet with an employee, that he had to make that request through Mr. M____ himself before such meeting and arrangements would need to be made so that he could excuse Grievant off on official union business where it wouldn't jeopardize her absenteeism. (Tr. 45)

Ms. L____ testified that, in the past, Mr. S____ had followed this procedure with other employees in the past. (Tr. 45)

Ms. L____ testified that at some point in the meeting, Mr. S____ "discussed the termination phase and indicated to S____ that the company had given her every opportunity for help with her absences. Also, at Tr. 45-46 that:

> We talked about the family leave that we provided. We talked about offering her to consider vacation time rather than risk termination. I know J__ mentioned on numerous times over the years that he supervised her, he's been there, available for her if there was anything that she needed.
>
> By matter of course and all meetings during this session, I would talk about the employee assistance program for help for employees. I know through the year --calendar year 2000, I discussed that with S____.
>
> We basically had said at the point --because we had done all we feel we could at the time to help her and she wasn't willing or she wasn't able to adhere to the attendance policy-- we had nothing more available to offer to maintain her employment at Pilkington.

Ms. L____ also testified that Grievant stated, as she had in prior meetings, that she didn't want to disappoint anyone at the company, and Grievant stated she was going through a tough time. (Tr. 46)

Ms. L____ testified that all parties confirmed that where employees have back to back absences, as in this case, "there is no opportunity to change behavior and correct the attendance policy, because they're already at termination. And so, to give a warning for the tenth absence, and then turn around and give it for the eleventh really wasn't serving any purpose. So we were elevating the discipline to termination." (Tr. 47) Grievant was told that her employment was terminated. After the termination papers had been presented, Mr. S____ asked whether, if Grievant presented a medical excuse, such would excuse the no call, no shows. The response was that this was no longer relevant under Employer policy.

General Comments/Discussions (JT-4) states:

> Meeting held at 1:00 pm with S__ M____, E__ S____, J__ M____ and S__ L____ regarding S___'s attendance. J__ asked S____ why she was a no call, no show for the past two days and she responded that she didn't think they needed to for 6/22 (no fault policy) and E__ told her to not report to work on 6/23. J__ informed S____ that E__ did no have the right to tell her to not report to work and the absence put her at termination. J__ said she had been given more chances that the Company could afford and we were

going to terminate her employment. S____ said she was going through a tough time and didn't want to disappoint anyone (she says this each and every attendance discussion). S____ was terminated for excessive absenteeism, bypassing the Final Warning due to the consecutive no call, no show absences.

Mr. M___ also testified that the decision to discharge Grievant was based solely on Grievant reaching her 11th unexcused absence on June 23rd. (Tr. 65)

Union Position. Mr. S____ spoke to Grievant on June 22 and he arranged to meet her at the Union office at 7:30 am, the 23rd. This meeting did not take place because he was called to speak to Ms. L___ and Mr. M____ at this time. (Tr. 104) His file notes state (U-1) that, instead:

6/23/00
R__ J____ call me and said that S__ L____ wants to meet us at 7 am over M____ termination. We walk in S__'s office and J__ M____ was in her office also. We talked about M____, R__ was up set(sic) because S__ it termination her because of successive user of absentee. We ask her what time she wanted her in. S__ replied about 1pm. At 1pm J__ ask who told her not to report to work. S__ calls her 6/22/00 and told her she was being terminated as soon as she get a hold of E_ S____. I call to set a meeting with her IRC person and M_____ on 6/23/00 that S__ new about. The company also allowed us to meet with the people that were in trouble. If S__ didn't tell her she was being terminated she would have came to work on 6/23/00.

On cross-examination, Mr. S___ that when he went into this morning meeting with Mr. M___ and Ms. L____ he asked, "What is this all about," because I have not met with S___ and R___ J____ at the other office." He testified that, to this, Mr. M____ stated, S___ did not report to work and you do not have any rights calling her out." (Tr. 101)

Mr. S____ further testified he had never known a case where a person was allowed to work when they were being terminated on the same day. (Tr. 91)

Other Union Evidence

The Union introduced a memorandum addressed to Union President S___ dated August 14, 2002 (U-3). The memorandum was prepared by HR Mgr. L____ regarding the Acceleration Clause as she was recommending it be applied to another bargaining unit employee. In the memo, Ms. L____ recommends application of the Acceleration. In that situation, as the consequence of the continuously rolling 12-month period, the employee at issue:

…received a Final Written Warning for incurring ten (10) unexcused absences and served a 14-day suspension 5/3/02-5/16/02. Due to days rolling off and additional unexcused absences, …[the individual]…incurred nine (9) unexcused absences which resulted in a seven (7) day suspension from 8/2/02-8/8/02.

Grievant's Version of Events

Grievant testified that on the morning of June 12 she asked for an emergency vacation day to attend to her 9-year old son who was hospitalized with acute pneumonia. She was told that, absent 24-hour notice, she would have to take FMLA leave.[5] That afternoon she was informed that her son would be hospitalized for the rest of the week. She called in and asked for a vacation day for the following day, the 13th, and was informed that, absent 24-hour notice, she could not use vacation. She used her FMLA again. She was, however, granted vacation time for the remainder of the week.[6]

The medical certification provided by the physician for Grievant's son, which form is dated June 15 states, in response to the question "If the patient will need care only intermittently on a part-time basis, please indicated (sic) the probable duration of the need," the handwritten notation" "7-10 days from hospital discharge."

Thus, Grievant was not at work the week of June 12, taking 2 days FMLA and 3 days vacation. The following week she took FMLA leave for June 20-21[Her Attendance Record shows that she was at work on June 19].

Grievant testified that she did not recall speaking to Ms. L____ on June 21, the date given to the conversation by Ms. L____ as recited above. Rather, she stated that she first raised the matter of a 14-day suspension on June 22, when she phoned Ms. L____ before 11:00 am and Ms. L____ informed her that she would be terminated.

During this conversation which Grievant ascribes to the 22nd, Grievant testified she asked, "because I hadn't called in and it was in the morning, I asked her if I could still call in and asked her what to do, because I knew it was my tenth day. She said it was too late to call in, that I was at the point of termination." (Tr. 118)

She asked Ms. L____ if she could come to work late [Grievant explained that the Employer always had a policy wherein an employee could come to work late.]. Ms. L____ said no, that Grievant was going to be terminated. It was then, according to Grievant, that she asked if she was not supposed to get a 14-day suspension first. Ms. L____ said no, the company had a right to bypass that step when they felt someone was having frequent absences and abusing the system, and that she, Ms. L____, was doing that, and that Grievant was going to be terminated. (Tr. 117-119)

According to Grievant, her only inquiry concerning the 14-day suspension was as recited above. Grievant testified she did not recall having a conversation with Ms. L____ about her vacation time, since it had been denied her previously absent 24-hour notice, when her son was in the hospital. She testified that, had she known she would be terminated, she would have taken her vacation time. (Tr. 119) Grievant testified that she saw no reason to call off on the 23rd because, when she asked Ms. L____ on the 22nd whether she could still call off, she was told that she could not, because it was her tenth day and it put Grievant at the point of termination. (Tr. 124)

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[5] The Employer policy provides an employee time after an FMLA day to provide proper certification.

[6] A phone message form dated 6/12 at 10:20 am addressed to Ms. L____ states: "S____ left me a msg. that her 10 year old son was hospitalized w/ pneumonia & her Dr. wanted the FMLA papers faxed to him. See my note on fax."

On cross-examination, Grievant was shown a document submitted by Grievant that was a note from Grievant's own physician certifying disability for June 12-13. While she stated that her son in fact was in the hospital, the Employer argues that the FMLA leave for the 12th and 13th was for Grievant's condition, and not that of her son. (Tr. 127)

Grievant testified that she aware on the 22nd, while she was on FMLA leave, that her FMLA leave had expired. (Tr. 128)

Grievant testified that Ms. L____ in the past had been helping her, and that Ms. L____ always told her to call her and had even given Grievant Ms. L____'s direct office number. It appears from a letter to the Union prepared by Grievant about a month after her discharge (U-10) that Ms. L____ had agreed to be the Employer contact person for Grievant in April because another HR person had purportedly failed to properly handle Grievant's account for Grievant's requested FMLA leave. Grievant refused to deal with that HR person and Ms. L____ agreed to take over Grievant's paper work. Later in April, when Grievant had a no show, Ms. L____ agreed to meet with her at the Union hall, rather than the plant facility, to spare Grievant some embarrassment. The meeting took place at the plant because of a last minute conflict Ms. L____ had. (Tr. 136-137)

POSITIONS OF THE PARTIES

The Union submits:

(1) Grievant was discharged without just cause on June 22, and not June 23. All Union witnesses provided testimony that Grievant was discharged on June 22.

(2) Consequently, Grievant should not be credited with an absence on June 23 when she did not appear for work.

(3) The discharge on June 22 was inconsistent with the Agreement's Attendance Policy because the Employer does not have the discretion, in the circumstances of this controversy, to unilaterally omit any steps of the progressive discipline provided under the Agreement. In this regard, the Agreement requires that before any acceleration, the Employer must satisfy the second sentence of the Acceleration Clause and must first meet with the Union President.

The Employer submits:

(1) Grievant's record demonstrates she was unwilling to come to work and to change her unsatisfactory behavior.

(2) Grievant was undisputedly a no call, no show on June 22 and 23.

(3) The Union President admitted he had never taken someone out of work without PNA permission, and Grievant's belief that she was "at the point of termination" does not excuse her failure to report to work on June 23.

(4) Grievant's "disregard for her obligations to the Company over a long period of time compels" discharge in the circumstances of this case.

(5) On June 21, 2000, Grievant was at the penultimate stage in the progressive discipline system. Instead of attempting to conforming her conduct to standards established by the company and her union, Grievant was attempting to use the system to obtain more time off, albeit for a disciplinary suspension.

OPINION

Prefatory Comments

This case was presented at hearing more two years after the occurrence of the matters in controversy. In reviewing the testimony and the documentary evidence in the hearing record, I try to take this into consideration. People can recall the same events in a slightly different manner with each believing, and perhaps rightly so, that they were truthfully recalling what occurred. Similarly, I recognize that this is an adversary hearing so that witnesses, unless pressed, are not inclined to volunteer facts which they may deem weakens their position.

I am interested in assessing testimony in light of life's realities, the internal consistency of what a witness is saying, and its consistency, or lack of it with the other testimonial and documentary evidence in the case. While I observed the demeanor of the witnesses as they testified, I am wary of overestimating demeanor.

All this is prefatory to the following: I am in the anomalous position of not relying on the testimony of Grievant when Grievant states that the subject matter of the conversation attributed to Ms. Lamberth as occurring on the 21st actually occurred on the 22nd. I do rely on Grievant's testimony for purposes of what she and others stated occurred on the 22nd, since there was corroboration.

The Record Evidence Concerning Grievant's Attendance

The only admissible record evidence concerning Grievant's history of attendance that I may properly evaluate dates after January 1, 2000, only. In reviewing the admissible evidence in this record, the excused days almost entirely comprised those days taken pursuant to the provisions of the Family and Medical Leave Act (FMLA) (20 U.S.C. Sec. 2601 *et. seq.*) as well as the State of California's California Family Rights Act. (CFRA) (Ca. Govt. Code Sec. 12945.1-12945.2), a statute which was amended to conform with FMLA. These laws are substantially consistent and qualifying leave runs concurrently under both statutes. The FMLA does not preempt California law in any manner where greater protection is otherwise available under California law. (*See* Dept. of Labor FMLA regulations 29 C.F.R. Sec. 825.701) Employees qualifying for FMLA leave are entitled to take up to twelve work weeks of unpaid time off each "year," the start of which can be variously measured at the Employer's option, as I understand it. While the FMLA and CFRA provide that up to twelve work weeks unpaid leave may be taken per year, on brief and at hearing (Tr. 19), the Employer noted that it's family leave policy, if I understand it accurately, was calculated on the basis that an employee may have up to ninety days of FMLA leave during a twelve-month period.

My count of the color-coded FMLA-excused days on Grievant's Attendance Record shows that 63 FMLA days(excluding weekend days, New Year's and paid bereavement day) were credited to Grievant in the period January 1 up to and including June 21.[7] By my count, Grievant received several days more than she would otherwise be entitled to under my understanding of Federal and State law even were the FMLA year construed as beginning with the January 1 starting date of the Attendance Policy.

Grievant has a legal and Employer-policy entitlement to these days.

[7] Article XIX of the Agreement states that the normal work week at the facility is 40 hours.

On brief, the Employer observes that Grievant was absent after January 1 far more days, for various reasons, than days she appeared for work. However, this will not be my focus. Grievant has a legal entitlement to FMLA leave and a contractual entitlement to leave that fall under the "excused" category in the Attendance Policy. Therefore, my focus will be on "unexcused days" to assess whether the Employer had just cause to terminate Grievant in the circumstances of this matter.

The June 21 Conversation

Grievant's status as of the day of this conversation was the same as it was almost two months earlier, when she received a one-week suspension. I take this conversation into my analysis because of its timing in relation to subsequent days of absence.

It is my view that this conversation more than likely occurred on June 21 and along the lines stated in the Employer's June 21 memo. This is based on several considerations, none of which when taken examined independently would be dispositive; viewed in their totality, however, they are compelling.

First, the file memo recording the conversation has a detail and internally logical consistency to suggest that it was not fabricated. It is logical that such a conversation would have been memorialized close to the event. Second, given the testimony of Grievant, HR Mgr. L____ was particularly supportive of Grievant to the point where she took a direct interest in accommodating Grievant's interests to the point of giving Grievant her direct office phone number. There is motivation for Ms. L____ to fabricate. Third, Grievant alleges she phoned Ms. L____ the following day, not the other way around. This is suggestive that there was something left hanging between them; otherwise, Grievant would have just not appeared on June 22, and taken her Final Warning In this regard, as abundantly noted, the record reveals only that Grievant had received discipline after January 1 because of absenteeism and the Agreement allows for sanctions only upon 3 consecutive days of failure to call in]. Fourth, the Union argues that a vacation day option could not have been offered to Grievant because it was contrary to Employer policy. In my estimation, it is the very existence of this type of charitable offer, which I regard as an admission against interest, given that it loosens the application of the vacation policy, albeit it is a charitable act which should be taken as isolated and of no value as precedent under the Agreement.

However, all that occurred in this conversation was that Grievant requested an additional FMLA day, which, under Employer policies, was not available to her. Nor was there the likelihood that Grievant would be granted a 2-week leave of absence. There was discussion concerning what Grievant could expect in terms of a Final Warning under the Attendance Policy. It was clear, however, that Grievant announced an intent to take the following day off. The conversation finished off with at least Ms. L____'s understanding that Grievant would get back concerning which of the options that Grievant had available to her. With respect to Grievant's statement that the taking of a two-week suspension was an option available to her under the Attendance Policy, no pejorative connotation can be given to Grievant advancing an arguably protected claim to a colorable contract right.[8]

Accordingly, I must find there was nothing stated in this conversation which would allow a conclusion that there was a "pattern" of undesirable behavior. Hearing nothing to the contrary, Grievant could also come away from the conversation with the notion that any further unexcused absence would

[8] *NLRB v. CityDisposal,* 465 U.S. 822 (1984); *Union Carbide Corp*., 331 NLRB 356 (2000).

warrant nothing more than the application of a Final Warning and a two week suspension under the Attendance Policy's "no fault" progressive discipline system.

The State of Affairs As Of The Morning Of June 22

Grievant was credited with a no call, no show on this date.

The "no call" aspect is true in a hyper-technical sense. What is clear is that Ms. Lamberth, based on the previous day's conversation with Grievant, and in the absence of Grievant not getting back to her concerning whether Grievant would be availing herself of a vacation day, could infer that Grievant's announced clear intent to take June 22 off work was being done with the expectation of receiving a Final Warning.

While this was certainly a no show, it is questionable that the pejorative connotation of a "no call" should be attached to the circumstances. The failure to appear for work did not appear in a complete vacuum.

But this certainly constituted a single unexcused absence.

Theories Concerning The Operation Of The Acceleration Clause

Theory 1. HR Mgr. L____ testified that Grievant did not receive a Final Warning because she had two consecutive no call days, so that there was no "opportunity to change behavior, have a counseling session." (Tr. 30) This was the rationale used by the Employer on June 23 to justify the Employer's discipline of Grievant. For purposes of this case, the Union seems to contest only the count of days, and does not dispute the broad proposition.

Theory 2. There was another justification revealed in the record. It is the justification advanced to the Union on June 22. It is Employer's contention, as advanced by Ms. L____, that "employees who are at the various levels of warning and they incur further warnings and don't seem to change their behavior and understand that they need to be dependable, loyal employees to continue working.(sic) In this particular case, at the time our concern was S___ had had the seven calendar day suspension. She incurred another unexcused absence, which would have given her a 14-day calendar suspension. When employees have that kind of pattern and there's no sign of improvement, we need to have a discussion if this employee is someone that should really be working at Pilkington." (Tr. 34) Under this theory, as the Employer stated to the Union, it had the contractual right to impose discipline by eliminating or omitting one or more steps in the progressive discipline system, in this case the Final Warning, and proceeding directly to the last step, Discharge. (See, also, Tr. 36)

Theory 3. The Union introduced a memorandum (U-3) prepared by Ms. Lamberth that it argues on brief constitutes the proper application of the language of the Acceleration Clause. The memorandum was directed both to Union Pres. S____ and the Employer's Plant Manager. In this exemplar, the individual had received a 14-day suspension, but due to the rolling aspect of the policy, had then reverted back to a 7-day suspension for her next unexcused absence. Ms. L____ recommended "(a)t minimal, I suggest a counseling session at you level, however we do have provisions in the contract that gives us the right to escalate the disciplinary process to Step 5, which is termination. … If you would like me to schedule a meeting where we can all discuss the case, please let me know."

I am averse to making more than superficial comments about the manner in which the Acceleration Clause should operate, and certainly no findings. A more than cursory discussion by me of the implications of Theories 2 and 3, which are a matter of contention between the parties, runs the risk of creating more problems than it would solve. This case was not submitted to me as a contract interpretation matter, nor was the issue submitted framed as a contract breach; there is no record evidence of collective bargaining history provided by either party in support of their respective positions, and the only evidence of "practice" available is an instance which antedates the events at issue by two years. Most importantly, given that the submission issue relates to the issue of just cause discharge and not contract breach, I am without jurisdiction to decide other than the issue of just cause under the Agreement.

While I am disinclined to venture into interpreting the Acceleration Clause under Theories 2 or 3, I would note that the language of the Acceleration Clause, whatever the Employer's contractual rights my be, does not present anything that would negate the "just cause" requirement of the Agreement. The Employer does not argue to the contrary. The appropriate focus for me is not what action the Employer can precipitate, it is whether what the Employer has done can be sustained under the "just cause" requirement. Stated another way, I see nothing which preempts the "just cause" clause of the Agreement which give the Employer contractual sanction for unfettered discretion when imposing discipline under the Attendance Policy.

Theory 1 poses no such concerns. The language is clear, and the parties agree to the clear meaning of the language adjacent to Steps 1-5. There is no Union contention that June 22 should not have been recorded as a "no show no call" absence. The Union objects to the fact that the Employer relies on June 23 as a day of unexcused absence.

The Employer Is Estopped From Relying On June 23 As A No Call No Show

In my view, it is unnecessary to make an explicit finding that Grievant was discharged on July 22 as opposed to June 23, or that Grievant was discharged because Grievant failed to appear for work on June 23, as contended by the Employer. The Employer cannot rely on June 23 on equitable grounds in any event.

The doctrine of equitable estoppel "in its traditional form states that a party who is guilty of a misrepresentation of existing fact upon which the other party justifiably relies to his detriment is estopped from denying his utterances or acts to the detriment of the other party." However, "…(u)nder the modern doctrine of estoppel a misrepresentation of fact is not necessary--a promise or an innocent representation of fact being sufficient to form the basis of an estoppel…" J. Calamari & J. Perrillo, *The Law of Contracts*, (1970) Sec. 166, pp. 268-269. Here, the Union has presented persuasive, unrebutted evidence for the application of the estoppel doctrine. The elements of knowledge, mistaken belief, and detrimental reliance have all been satisfied.

There is no evidence one way or another that here there was any calculated "intent" to mislead the Union. And intent is certainly not the issue. Instead, the conversations with Union representatives on June 22 conveyed to the Union and the Grievant herself that Grievant's discharge was a *fait accompli*. Consequently, the Union and Grievant would see no further need for Grievant to appear for work on June 23.

On the morning of June 22, IRC J____ was told that Grievant was going to be discharged for "excessive absenteeism." He protested that she was "due 14 days off." He then overheard enough of the

conversation between Grievant and Ms. L____ during which Ms. L____ stated that "there was no use calling in, she was already too late. He construed this as Grievant being told she was not allowed to come in.

After the conversation, Ms. L____ repeated to IRC J____ that she was going to discharge Grievant. IRC J____ protested that Ms. L____ was not "doing this right." There is nothing in these circumstances to support that Grievant was to come in the next day merely for purposes of a counseling discussion of intended discipline in the future.

Union Pres. S____'s recall of the conversation, as reflected in his notes, is that, Ms. L____ stated," We are going to terminate S__ M____ for Successive or frequent repeat unexcused absences." Protesting that he could not come back to the plant, Ms. L____ stated, "E__, we want to bring her in for termination on 6/23/00." The memo reveals that Ms. L____ replied, OK.

There are two observations to make from the above. The first is that there was an affirmative acquiescence that Mr. S____ would be meeting with Grievant before meeting with the Employer representatives. The ramifications of the "OK" at the least encompass that the Grievant not going to work, but rather, meeting with the Union. The second is that Mr. S____ records that on June 22, he was told "we want to bring her in for termination on 6/23/00." Since Grievant's 6/23 absence could not yet occurred as 6/22, the date of this conversation, whatever was meant, it certainly conveyed that the decision to terminate was a *fait accompli*. This is the application of Theory 2. It also constitutes detrimental reliance.

I do not construe anything in the testimony of Employer witnesses concerning the 6/22-23 conversations that specifically contradicts the Union's notion that the Employer had effectuated a discharge of Grievant based on Theory 2 on 6/22, or that contradicts that Ms. L____ had acquiesced to Mr. S____'s request to meet with Grievant before he met with the Employer. The Employer was well aware of this Union mistake, but instead took the position that Mr. S____ was simply without authority to meet with Grievant because Mr. S____ had not followed the procedure of clearing this with *Mr. M*____, when the previous conversations had been with Ms. L____.

The Employer received an undue benefit from this conduct. As noted, the Union does not dispute Theory 1 in terms of its vitality as a broad proposition. The Employer was thus able to receive the benefit of Theory 1 ["…when S___ was a no call, no show for two days, it made it clear that elevating the warning level to discharge was appropriate…"], rather than the application of Theory 2 the application of which the Union vigorously disputed starting on June 22.

Therefore, the Employer has not met its burden of proof in this discharge proceeding that Grievant can count Grievant as having two consecutive unexcused absences on June 22-23. The discharge cannot be sustained on this basis.

Finally, it is not clear to me, despite the conversations with the Union on June 23 that the Employer on brief has entirely abandoned Theory 2. A number of generalized arguments were advanced on brief that could be understood to mean that Grievant's record otherwise justified moving directly to Step 5 from Step 3 as of June 21. In an excess of caution, I will addressthis issue.

First, the Grievant's record as it is available to me suggests nothing more than the routine application of progressive discipline after January 1. There is no legally permitted or contractual basis which would permit a conclusion that the June 21 conversation establishes that Grievant showed a "pattern with no signs of improvement." Most importantly, even if the foregoing were not the case, and

such an inference could be made, Grievant never received *notice* that any further unexcused absence would result in the Employer rejecting the normal discipline progression and moving to Step 5, rather than Step 4.

It is generally accepted that the purpose of progressive discipline is to impose increasingly severe punishment so as to provide an opportunity for the rehabilitation of an unsatisfactory employee, deterrence of similar conduct, and preservation of the Employer ability to operate the business successfully. The clear language of the Preamble to the Attendance Policy reflects this. There is in this the fundamental requirement that an employer enunciate a clear standard, provide employee with notice(knowledge) of the consequences of undesirable conduct.

Inherent in the concepts of just cause and due process is that an employee receive such notice

In the circumstances here, Grievant never received notice that the Employer intended to invoke an interpretation of the Acceleration Clause which eliminated the next step in what was clearly part of the progressive discipline of Attendance Policy. Absent specific notice that the Employer will utilize "pattern", rather than "no fault" considerations, in assessing discipline in the future, the Employer lacks just cause to predicate discipline as in this case.

The mere existence of the Acceleration Clause in the Agreement does not provide this notice because it provides no hint concerning when, if ever, and under what circumstances the Employer might choose to implement it.[The Union's Theory 3 might provide prior constructive notice under the "meet with the Union" language, but it is not necessary to reach this contract interpretation issue since, at best, the Employer intended to meet with the Union and Grievant *after*, not before, Grievant's next unexcused absence.]

Absent clear notice to the contrary, it was reasonable for Grievant to rely on the Employer following all the "no fault" steps being followed, particularly in circumstances where, on June 21, when the Employer gave no indication that implementation of the Acceleration Clause was in the offing. The Employer has not met its burden to sustain the discharge on the basis of the absence of prior notice.

Summary

I have found that the Employer is estopped from asserting that Grievant should be charged with an unexcused absence for June 23, (JT-4), and that the Employer could not otherwise rely on a "pattern" of Grievant's behavior to justify, absent clear notice, deviation from the steps of the progressive discipline procedure of the Attendance Policy.

On June 23, Grievant should have been disciplined consistent with Step 4, the Final Warning level of the Attendance Policy.

I am mindful that the Union contends that Grievant should be reinstated and otherwise be made whole. Given the over two year passage of time from the date of discharge to the hearing in the matter, there is some probity to this position.

An arbitrator's authority to order a traditional make whole remedy is equitable in nature, however. In *Capitol Parking Co.*, 36 LA 101, 102 (Seligson, 1961), the Arbitrator noted…"a discharge case in

arbitration is a hearing in equity, of a flexibility and assessment of mitigating circumstances and factors not available under the more rigorous common law rules."

I see no probative reason why a make whole remedy should now place Grievant in a more improved position than the position she should have been in on June 22. Grievant should be not reinstated as though this 10th unexcused absence did not occur. Grievant unarguably had an unexcused absence on June 22, and may be disciplined consistent with the progressive steps set forth in the Attendance Policy. I have also noted in this Opinion that I am troubled by Grievant's lack of candor which required me to credit the Employer to advance some major aspects favorable to Grievant's own case. The remedy below will reflect this.

AWARD

Accordingly:

1.The grievance is sustained to the extent that it alleges that the termination of the Grievant was not for just cause.

2. As a remedy, Grievant is entitled to reinstatement to her former position, on or before the next regular pay period following the parties' receipt of this Award. She shall be entitled to full back pay, less traditional deductions, including, but not limited to, interim earnings and less pay for a two weeks' suspension. She shall be made whole for all benefits (except seniority) specified in the Agreement and Employer policy, including pension contributions, for the period from her discharge to her reinstatement. She is not awarded retroactive plant and departmental seniority for this period.

3. Grievant shall be reinstated to Step 4 Final Warning Status. The rolling twelve-month period of the Attendance Policy shall continue to operate in the same manner as it would have operated had Grievant received a Final Warning on June 22. Nothing in this Remedy should be construed as compromising, alienating or otherwise affecting her contractual right to receive excused absences consistent with the Agreement's Attendance Policy and/or her entitlements under Federal and State law. Also, Grievant shall be construed as being reinstated under a new rolling 12-month period under the Employer's own administrative leave policies

4. Consistent with the stipulation of the parties, the Arbitrator will retain jurisdiction for purposes of resolving issues bearing on implementation or interpretation of this Opinion and Award for a period of 60 days.

DATED at Eugene, Oregon this 31st day of January 2003**.**

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Charles H. Pernal, Jr., Arbitrator